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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 110

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 156–166) is reported at 354 F. 2d 594. The Board's findings of fact, conclusions of law, and order (R. 2–36) are reported at 149 NLRB 646.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1965, timely petitions for rehearing were denied on January 24, 1966, and a decree was entered on February 23, 1966 (R. 156, 168, 176). The petition for a writ of certiorari was filed on April 20, 1966, and was granted on June 6, 1966 (R. 177; 384

U.S. 968). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth *infra*, pp. 8–9, and in the Appendix to the Board's brief in *National Labor Relations Board* v. *National Woodwork Manufacturers Ass'n*, No. 111, this Term.

QUESTION PRESENTED

The union and the employer have an agreement which provides that the employees will not handle pre-cut doors; this agreement (which the Board found lawful) [1] is intended to preserve work for the employees which they have traditionally performed; the employer, a building contractor, is not obligated by his contract with the project owner to use pre-cut doors. The question presented is whether in these circumstances the union engaged in an unlawful secondary boycott within the meaning of Section 8(b)(4)(B) of the National Labor Relations Act when it refused to install pre-cut doors for the employer.

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[1] The Board's ruling that such a provision is not unlawful under Section 8(e) of the Act was reversed by the Seventh Circuit, and this question is at issue in the companion case, *National Labor Relations Board* v. *National Woodwork Manufacturers Ass'n*, No. 111, this Term.

STATEMENT

The facts are set forth more fully in the Statement in the Board's brief in *National Labor Relations Board* v. *National Woodwork Manufacturers Ass'n*, No. 111, this Term, pp. 2–6. In short, the Metropolitan District Council of Carpenters in Philadelphia and the General Building Contractors Association, representing the contractors in that area, are parties to a collective bargaining agreement which contains a provision stating that no member of the Council shall be required to handle pre-cut doors.[2] The Board found that this provision was designed to preserve for the employees covered by the agreement work which they had traditionally performed, and accordingly dismissed the allegations in the complaint that the provision violated Section 8(e) of the Act.

This case involves the Council's activity with respect to Frouge, one of the contractors covered by the agreement. When Frouge ordered pre-cut doors, although not obligated by his contract with the owner of the construction project to do so, the Council, invoking the pre-cut door provision of the agreement, directed its members employed by Frouge not to install them. Frouge then substituted "blank" doors, and the Council carpenters proceeded to install them, even though they, like the pre-cut doors, bore no union label. The Board dismissed the allegation in the complaint that

[2] Rule 17 of the then-effective collective bargaining agreements between the Council and the Association contained the pertinent provision, and is set out in pertinent part in our brief in No. 111, p. 3.

the Council's efforts to make Frouge abide by the agreement constituted an unfair labor practice under Section 8(b)(4)(B) of the Act. The Board reasoned that, since Rule 17 was a lawful work preservation clause and Frouge had control over the kind of doors he used, the Union's efforts were primary and not secondary—to stop Frouge from violating the lawful contract prohibition against the use of pre-cut doors, and not to put pressure on some other person.[1] The court below sustained the Board's dismissal of the complaint with respect to the incident involving Frouge, but set aside the Board's finding that the pre-cut door provision was not violative of Section 8(e) of the Act. (The correctness of the latter ruling is involved in the companion case, No. 111, this Term.)

SUMMARY OF ARGUMENT

I.

Section 8(b)(4)(B) of the Act makes it an unfair labor practice for a union to engage in or induce a strike or a refusal to handle goods where its object is to force any person to cease using another's products or to cease doing business with any other person.

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[1] However, the Board held that the Council's refusal to install pre-cut doors for three other contractors violated Section 8(b)(4)(B). In the Board's view, since these contractors were obligated by their contracts with the project owners to use such doors, they did not have control over the work that the Council sought to protect for the members; therefore, an object of the Council's work stoppage was necessarily secondary—to compel the project owners to desist from specifying the use of pre-cut doors in their contracts with the contractors. Certiorari has not been sought on this aspect of the case. See the discussion *infra*, pp. 15–17, 20–22.

A proviso exempts primary strikes and primary picketing. Section 8(b)(4)(B) (apart from a consideration of the proviso) is not to be read literally, for otherwise it would ban all primary activity. The proper test under this Section is whether the union has a real dispute with the employer against whom pressure is exerted, such as a dispute over the working conditions of his employees, or whether its objective is to put pressure on some other employer or to affect conditions elsewhere. In the former case, the union activity is "primary" and outside the reach of Section 8(b)(4)(B); in the latter case, it is "secondary" and proscribed thereby. The primary activity proviso of Section 8(b)(4)(B), added in 1959, confirms that this is the proper reading of that Section, since it makes explicit the primary/secondary distinction previously developed judicially.

Applying this principle here, the Board correctly held that the Union's work stoppage against Frouge was primary and not secondary. In refusing to install pre-cut doors for Frouge, the Union relied on its agreement with the Association, which was applicable to Frouge and which provided that the employees would not be required to handle such doors. As shown in the Board's brief in No. 111, this provision was a lawful work preservation clause, reflecting the Union's policy of preserving for jobsite carpenters work which they have performed for over 80 years. Since Frouge had failed to abide by this lawful contract provision, the Union had a legitimate dispute with him; and, since he was not required by any ar-

rangement with the project owner to use pre-cut doors, Frouge was in a position to accede to the Union's demands without having contract relations with any other person severed or even directly affected. Accordingly, by refusing to handle pre-cut doors for Frouge, the Union confined its activity to the employer with whom it had its basic dispute, and its activity was therefore primary.

The Board's conclusion that the work stoppage against Frouge was not barred by Section 8(b)(4)(B) is not inconsistent with Congress' intention, in enacting the predecessor Section 8(b)(4)(A), to proscribe so-called "product boycotts." The legislative history of the 1947 Act shows that Congress was referring to product boycotts which were secondary in nature, *i.e.*, where the union disfavored a product because it was made under non-union conditions or because it bore the label of another union. There is no indication that Congress intended to reach the situation here, where the product is disfavored because its use deprives the employees immediately involved of work which they have traditionally performed.

There is no inconsistency between the Board's conclusion that the work stoppage against Frouge was primary, and its companion finding (which is not in issue here) that the Union's refusal to install pre-cut doors for three other contractors was secondary and hence violated Section 8(b)(4)(B). Since those three contractors, unlike Frouge, were obligated by their contracts with the project owners to install pre-cut doors, the Board was warranted in

concluding that, in refusing to handle such doors for them, the Union was really aiming at the project owners and the door manufacturers, and not the immediate employers. And even if the Court might conclude that the Board and the court below placed undue emphasis on the fact that Frouge had "control" over the kind of doors he could use (while the other three contractors did not), the result reached with respect to Frouge—the only matter at issue here—is nevertheless proper.

II

It is contended that the Board's view—that Section 8(b)(4)(B), and the companion Section 8(e), do not apply to a situation where a union disfavors a product because it deprives the bargaining-unit employees of work which they have traditionally performed—impedes technological change and perpetuates costly work practices. These policy arguments are more appropriately addressed to Congress than to this Court.

Thus, even assuming that a prefabricated product is less costly for the builder and has other economic and social advantages, the fact remains that, if the use of that product would deprive jobsite employees of work which they have previously performed, there is an injury to their legitimate interests. Various means are available for accommodating these conflicting interests. In view of the difficulty of the problem and the strong considerations on both sides, Congress concluded that it was best to leave the matter to the free play of economic forces and the bargaining table. The Board's interpretation of the Act is

consonant with, and indeed reflects, that judgment. It is inappropriate to ask this Court to do what Congress chose not to do. Absent convincing evidence of congressional intent, the Court should not reach a result—such as that contended for by the Association and the Amici—which would effect a sweeping change in collective bargaining practices and labor-management relations generally.

ARGUMENT

I

THE UNION'S WORK STOPPAGE AGAINST FROUGE HAD A PRIMARY RATHER THAN A SECONDARY OBJECTIVE, AND THUS DID NOT VIOLATE SECTION 8(b)(4)(B) OF THE ACT

Section 8(b)(4)(B), the so-called "secondary boycott" provision of the National Labor Relations Act, makes it an unfair labor practice for a labor organization or its agents—

> (i) to engage in, or to induce or encourage any individual * * * to engage in, a strike or a refusal in the course of his employment, to use * * *, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person * * *, where in either case an object thereof is—
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> * * * * * *
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

A proviso adds—

> *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *.

In deciding whether union conduct violates Section 8(b)(4)(B), the statute, apart from a consideration of the primary activity proviso, is not to be read literally.[4] If it were, it would ban all primary union ac-

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[4] Of course, a literal reading of Section 8(b)(4)(B)'s language, as amended in 1959 by the addition of the proviso specifically exempting primary strikes therefrom (set out above), would clearly result in a determination that all primary activity is outside the scope of that section. As we pointed out in our brief in No. 111 (Bd. Br. in No. 111, p. 18, n. 11), the proviso was merely intended to make explicit what had otherwise been implicit previously. See H. Rep. No. 741, 86th Cong., 1st Sess. 21, I Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 779; H. Rep. No. 1147 (Conference Report), 86th Cong., 1st Sess. 39, I Leg. Hist. 943 (1959). The purpose of the proviso was recognized by this Court in *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 681. Since the 1959 proviso simply confirms the prior law that primary activity is not proscribed by Section 8(b)(4)(B) (nor was it proscribed by the predecessor Section 8(b)(4)(A)), no great reliance need be placed here on the proviso. Nevertheless, the proviso is now part of the Act, and if there was any doubt before 1959 that primary activity was not made unlawful regardless of the literal language of the Act, that doubt has now been definitely resolved in a manner consonant with the approach here taken. As pointed out by petitioner National Woodwork Manufacturers Association (hereinafter Association or NWMA) (NWMA Br. 43, n. 61), the court below made reference to the proviso (R. 162, 163) in upholding the Board's determination that the work stoppage with respect to Frouge involved protected, primary activity.

tivity, since "an object" of every work stoppage is to force the immediately affected employer "to cease handling the products of * * * or doing business with" all other employers. *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 672. Instead, the proper test of legality under Section 8(b)(4)(B) is whether the union has a real dispute with the employer against whom pressure is exerted, such as one relating to the terms and conditions of employment of the members of the bargaining unit, or whether its object is to put pressure on some other employer or to affect conditions elsewhere.[5] In the former case, the union activity is "primary" and outside the reach of Section 8(b)(4)(B); in the latter case, it is "secondary" and proscribed thereby. Applying this principle, the Board correctly concluded that the Union's work stoppage against Frouge was primary and not secondary, and hence did not violate Section 8(b)(4)(B).

In refusing to install pre-cut doors for Frouge, the Union relied on its agreement with the Association, which was applicable to Frouge and which provided

[5] The section is directed against the secondary boycott whose "sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 37 (C.A. 2), affirmed, 341 U.S. 694. It must be interpreted to harmonize "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures not their own." *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675, 692.

that the employees would not be required to handle such doors (R. 10). As shown in the Board's brief in No. 111 (pp. 36–39), this provision was a lawful work preservation clause, reflecting the Union's policy of preserving for jobsite carpenters the work of cutting out and fitting doors which they have performed for over 80 years. Since Frouge had failed to abide by this lawful contract provision, the Union had a legitimate dispute with him; and since he was not required by any arrangement with the project owner to use pre-cut doors, Frouge was in a position to accede to the Union's demands without severing, or otherwise affecting, contractual relations with any other person. Accordingly, by refusing to handle pre-cut doors for Frouge, the Union confined its activity to the employer with whom it had its basic dispute, and its activity was therefore primary. That the Union was concerned solely with preserving work for Frouge's employees, and not with exerting pressure on other persons, is confirmed by the fact that, when the pre-cut doors were replaced with "blank" doors,[6] it proceeded to install the latter even though they did not bear a union label[7] (R. 15–16, 94–98).

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[6] A "blank" door is one which is not mortised for the knob, routed for the hinges, or bevelled to fit between the jambs prior to its arrival at the job site (R. 9).

[7] As the facts show, in the Frouge incident here involved, the Union was willing to, and in one of the other situations actually did, hang pre-cut doors in violation of Rule 17's literal language upon an agreement by the particular contractor to pay jobsite carpenters those wages lost as a result of not performing the cutting and fitting work. Such an attitude on the part of the Union plainly indicates that its objective was one of work preservation (R. 21, 26). Confirming this conclusion is not only the fact that the doors actually installed for Frouge

The Board's conclusion that the work stoppage against Frouge was primary is not inconsistent with Congress' intention, in enacting the predecessor Section 8(b)(4)(A), to proscribe so-called "product boycotts." The legislative history of the 1947 Act (NWMA Br. 30-34, 57-67) shows that Congress was referring to product boycotts which were secondary in nature, and not to a situation like that involved here. The examples given were those where the union disfavored a product because it was made under non-union conditions or because it bore the label of another union. The union's refusal to handle the product in these cases is secondary, for it has no dispute with the employer immediately involved over the working conditions of his employees. Rather, it has implicated that employer merely as a means of exerting pressure elsewhere, *e.g.*, to unionize the manufacturer of the product or to penalize him for recognizing some other union. Indeed, in some of these cases, the employees of the immediate employer may not even be capable of performing the work incorporated in the product. The situation here, on the other hand, involved primary activity, because the Union, in inducing Frouge's employees not to handle pre-cut doors, was not concerned with the conditions under which they were manufactured, but only with preserving work for those employees which they have traditionally performed. Nor is this analysis impaired by the

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had no union label, with no question even raised about this, but also that on one of the other projects the Union refused to hang pre-cut doors which *did* bear a union label (R. 69, 71).

circumstance that, in some of the secondary product boycott cases, the union may have been motivated by a desire to protect work standards (see Associated General Contractors Br. 46–50); the union's concern in that situation is not with the working conditions of the particular employees who have been induced not to handle the product, but with preserving the organizational gains that it has won in the industry generally, which would be jeopardized by the existence of non-union firms.[8]

The Board and court cases cited by the Association and the Amici (NWMA Br. 28–29, 31–32, 36–41, 45; Associated General Contractors Br. 36–37, 38–39, 53) are also consistent with the foregoing analysis. In each of these cases, the record showed, unlike here, that the union disfavored the product because of the conditions under which it was manufactured or for some other reason unrelated to the

[8] This was an example of a so-called "good" secondary boycott (see *Duplex Printing Press Co.* v *Deering*, 254 U.S. 443, 480 (dissenting opinion of Mr. Justice Brandeis)), which the opponents of Section 8(b)(4)(A) sought to preserve. And, it was this situation, *inter alia*, which Senator Taft had in mind when he declared that the Senate Committee had abandoned any effort to distinguish between "good secondary boycotts and bad secondary boycotts," and had instead banned all secondary boycotts. Associated General Contractors Br. 46–47, 48; *United Brotherhood of Carpenters and Joiners of America* (*Wadsworth Bldg. Co.*), 81 NLRB 802, 805–806. Since, as we have shown, the situation here involved primary rather than secondary activity, Senator Taft's remarks obviously have no bearing on it.

working conditions of the employees of the employer against whom strike pressure was exerted.[9]

In sum, contrary to the Association's view (NWMA Br. 48–49), the mere fact that a union disfavors a product is not enough to establish that the union has a secondary objective proscribed by Section 8(b)(4)(B) of the Act.[10] If it disfavors the product

[9] For a discussion of *Allen Bradley Co.* v. *Local 3, Electrical Workers*, 325 U.S. 797; *Joliet Contractors Ass'n* v. *National Labor Relations Board*, 202 F. 2d 606 (C.A. 7), certiorari denied, 346 U.S. 824, and *National Labor Relations Board* v. *Local 11, United Brotherhood of Carpenters*, 242 F. 2d 932 (C.A. 6), see our brief in No. 111, pp. 26–27, n. 24. See also *Local 1976, Carpenters' Union* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93 (refusal to handle non-union doors); *National Labor Relations Board* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F. 2d 149, 150, 152 (C.A. 9) (same); *International Union of Operating Engineers, Local 12*, 126 NLRB 688, 691, 696, enforced, 293 F. 2d 319, 321 (C.A. 9) (objection to use of non-union surveyors); *Sheet Metal Workers International Ass'n* (*Burt Mfg. Co.*), 127 NLRB 1629, 1631, enforced, 293 F. 2d 141 (C.A.D.C.), certiorari denied, 368 U.S. 896 (non-union manufacturer); *Local 98, Sheet Metal Workers* (*York Corporation*), 121 NLRB 676, 679 (product manufactured by members of another union); *Local 598, Plumbers* (*MacDonald-Scott*) 131 NLRB 787, 792–793, 800 (non-union manufacturer); *United Brotherhood of Carpenters and Joiners of America* (*Wadsworth Bldg. Co.*), 81 NLRB 802, 805, 834–835, enforced, 184 F. 2d 60, 61–62 (C.A. 10), certiorari denied, 341 U.S. 947 (active dispute over representation of manufacturer's employees).

[10] Emphasis is placed in the NWMA brief (NWMA Br. 33–45) on the fact that Section 8(b)(4)(B) is prefaced by the phrase "where an object thereof is." As pointed out by the NWMA, the language of Section 8(b)(4) "was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.'" 93 Cong. Rec. 6859, II Leg. Hist. of the Labor Management Relations Act of 1947 (G.P.O. 1948) 1623 (Senator Taft). Undue reliance on this language is misplaced. The NWMA

in order to preserve work opportunities for the employees immediately involved, its objective is primary and not banned by that section. If, on the other hand, the union is not concerned with the work opportunities of those employees, but with the conditions under which the product is manufactured or with other matters, its objective is secondary and banned by Section 8(b)(4)(B). As we have shown, the Frouge incident involved the former situation.

Finally, there is no inconsistency between the

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in effect argues for the adoption of a *per se* rule—*that* all refusals to handle goods are necessarily secondary, since an object thereof must relate to such goods. Such an argument is nothing more than a way of stating that Section 8(b)(4)(B) should be read literally and—despite the background of the section, the specific proviso added in 1959, and the clear intent of Congress to the contrary—the primary/secondary distinction disregarded.

Broadly viewed, every restriction on subcontracting could be regarded as having a secondary objective. Activity pursuant to and directed toward the effectuation of a work preservation agreement almost necessarily results, in many cases, in what might loosely be called a "product boycott." But so long as the objective is a primary one, the incidental effect of restricting an employer's use of certain products on the manufacturers of such products does not result in the activity being proscribed under Section 8(b)(4)(B). The NWMA's argument simply proves too much, and Congress hardly intended such a result. As succinctly stated by the Fifth Circuit in *Houston Insulation Contractors Ass'n* v. *National Labor Relations Board*, 357 F. 2d 182, 187 (C.A. 5), pending on petitions for certiorari, Nos. 206 and 413, this Term: "An illegal 'object' is something more than a result, even an inevitable result, of a work stoppage for a legitimate reason. Otherwise the right to strike would for practical purposes be nullified, a result which Congress clearly did not intend." See *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 672–673.

Board's conclusion that the work stoppage against Frouge was primary, and its companion finding (not in issue here) that the Union's refusal to install pre-cut doors for three other contractors was secondary and hence violative of Section 8(b)(4)(B). The Board found that these three contractors, unlike Frouge, were obligated, by their contracts with the project owners, to install pre-cut doors (R. 11, 12, 13–14, 53–55, 58–59, 60–61, 67, 68–69, 73, 77–78, 79, 83–84, 117–118, 120). Accordingly, the three contractors were powerless to grant the Union's demand that their employees be assigned the finishing work on the doors; these contractors, as a practical matter, could respond to the Union's pressure only by severing, or significantly altering, their existing contracts with the project owners.[11] In these circumstances, the Board was warranted in concluding

[11] Theoretically, the contractors could have employed some non-union employees to handle the pre-cut doors or they could have paid their union employees what they would have earned had they performed the finishing work on the doors (see R. 109, 113–114). But, the first alternative required the hiring of additional employees and undoubtedly would have subjected the contractors to union activity in any event, and the second alternative required the contractors (who had a fixed price contract with the project owners, R. 71) to pay an extra cost that could not be passed on to the project owners for work that would not be performed. See, however, note 7, *supra*. Accordingly, the Board properly concluded that the Union's demand on the three contractors who had no control over the doors to be utilized in the project contemplated that they would sever or alter their contractual arrangements with the project owners. See *Los Angeles Mailers Union No. 9* v. *National Labor Relations Board*, 311 F. 2d 121, 124–125 (C.A.D.C.); *Truck Drivers Union Local No. 413, Teamsters* v. *National Labor Relations Board*, 334 F. 2d 539, 547 (C.A.D.C.), certiorari denied, 379 U.S. 916.

that, in refusing to hang pre-cut doors for these three contractors, the Union was aiming, not at them, but at the project owners, and, in turn, at the manufacturers of pre-cut doors, *i.e.*, it was seeking to put pressure on the owners to desist from specifying pre-cut doors in their contracts with the contractors, so that the contractors would be free not to purchase such doors from the manufacturers. It therefore properly held that the activity directed against the three contractors was secondary, and violated Section 8(b)(4)(B) of the Act.[12]

[12] The Board's holding on this aspect of the case is, we submit, supported by this Court's decision in *National Labor Relations Board* v. *Denver Bldg. Trades Council*, 341 U.S. 675. In rejecting the union's contention that it had merely engaged in primary activity when it threatened the general contractor, Doose & Lintner, with a strike if he did not remove a non-union subcontractor, Gould & Preisner, the Court stated (*id.*, at 688–689, emphasis added):

> In the background of the instant case there was a long-standing labor dispute between the Council and Gould & Preisner due to the latter's practice of employing nonunion workmen on construction jobs in Denver. The respondent labor organizations contend that they engaged in a primary dispute with Doose & Lintner alone, and they sought simply to force Doose & Lintner to make the project an all-union job. *If there had been no contract between Doose & Lintner and Gould & Preisner there might be substance* in their contention that the dispute involved no boycott. If, for example, Doose & Lintner had been doing all the electrical work on this project through its own nonunion employees, it could have replaced them with union men and thus disposed of the dispute. *However, the existence of the Gould & Preisner subcontract presented a materially different situation.* The nonunion employees were employees of Gould & Preisner. The only way that respondents could attain their purpose was to force Gould & Preisner itself off the job. This, in turn, could be done only through Doose & Lintner's termination of Gould & Preisner's subcontract. The result is that the

Frouge, on the other hand, was able to grant the Union's demand for more work without disrupting contractual relations with other persons; consequently there was no basis for concluding that the work stoppage involving his employees was directed at anyone other than Frouge. Frouge alone was the Union's target, and the Union pressure was successful in forcing that immediate employer to order blank instead of pre-cut doors—which he could do under his contract with the project owner, and should have done initially under Rule 17 of the Council-Association collective bargaining agreement—thereby preserving for jobsite carpenters work traditionally done by them.

Council's strike, in order to attain its ultimate purpose, must have included among its objects that of forcing Doose & Lintner to terminate that subcontract.

Similarly, here, in view of the contracts with the three other project owners, the Union's work stoppage, "in order to attain its ultimate purpose, must have included among its objects" the secondary one of forcing the contractors to terminate those contracts.

See also *Local 5, United Ass'n of Journeymen Plumbers* v. *National Labor Relations Board*, 321 F. 2d 366 (C.A.D.C.), certiorari denied, 375 U.S. 921; *National Labor Relations Board* v. *Enterprise Ass'n of Pipefitters Union*, 285 F. 2d 642 (C.A. 2); *Ohio Valley Carpenters District Council* v. *National Labor Relations Board;* 339 F. 2d 142 (C.A. 6); *National Labor Relations Board* v. *International Longshoremen's Ass'n, Local 1694*, 331 F. 2d 712 (C.A. 3); *Local 636, United Ass'n of Journeymen Plumbers* v. *National Labor Relations Board*, 278 F. 2d 858 (C.A.D.C.). In all these cases, the courts, in agreement with the Board, have held that, even where a union's objective is to preserve work, it violates Section 8(b)(4)(B) of the Act by engaging in a work stoppage against a contractor whose contract with the general contractor does not embrace the work which the union seeks, and who is therefore "powerless to settle the dispute." *Local 5, United Ass'n of Journeymen Plumbers, supra*, 321 F. 2d at 369.

Contrary to the Association's assertions (NWMA Br. 47, 49–50), the fact that Frouge had "control" over the type of doors to be installed on the project was not the essential predicate of the Board's conclusion that the Union's inducement of his employees was primary rather than secondary. The Union's objective was the determinative factor in the Board's decision. The Board found the activity directed against Frogue to be primary because all of the circumstances indicated that the Union's objective was to preserve work for the Frouge employees, rather than to further a dispute with the door manufacturer or some other person.[13] Stated conversely, had the Union's objective been to unionize the door manufacturer, the Board would have found the inducement of the Frouge employees to be secondary, notwithstanding that Frouge was free, under his contract with the project owner, to purchase other doors.[14] In short, in the Board's view the existence of control on the part of the immediate employer is not determinative,

[13] So viewed, the presence or absence of "control" is not determinative, but, rather, is merely some indicium, or a criterion, along with others, for deciding whether certain activity is primary or secondary. In some situations the factor of control may be more relevant than in others, and in some cases the factor should probably be accorded but little weight.

[14] Thus, the Board will find a violation, despite a union's claim that it is seeking to preserve work for members of the bargaining unit, where the language of, or activity enforcing, a challenged clause shows that it is directed toward affecting relations between other employers and their employees. See, *e.g.*, *National Labor Relations Board* v. *Milk Wagon Drivers' Union, Local 753*, 335 F. 2d 326 (C.A. 7); *National Labor Relations Board* v. *Joint Council of Teamsters*, 338 F. 2d 23 (C.A. 9).

per se, of the question whether the union has only a lawful, primary objective.

Thus, in the Board's view, the factor of control is relevant only in determining whether the union can enforce its lawful work preservation agreement by engaging in a work stoppage. Because of Frouge's control the Union *could* legitimately seek to effectuate its primary objective of work preservation by refusing to handle pre-cut doors in reliance on the clause in its collective bargaining agreement. However, had Frouge lacked control, the Union's activity, as in the case of the other three contractors, would necessarily have been directed toward a secondary objective, even though the preservation of work opportunities was sought by the Union. It was within Frouge's power to provide the Union with such work opportunities; it was not within the power of the other three contractors, since their contracts with the project owners effectively removed the assignment of the particular work from the ambit of their control. Permitting the Union to rely upon the work preservation clause in the latter case necessarily would have had direct effects on those outside the employer-union relationship.[15]

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[15] In its *amicus* brief the AFL–CIO asserts that, even absent control, activity pursuant to a valid work preservation agreement should nevertheless be regarded as primary and not unlawful (AFL–CIO Br. 2–10). In effect, the AFL–CIO argues that activity to enforce an agreement not prohibited by Section 8(e) cannot be unlawful under 8(b)(4)(B). In the present case control did exist, so there is no occasion to pass directly on the question, which of course was presented with respect to the other three contractors. See the discussion *infra*, pp. 21–22.

Of course, the Court might disagree with this analysis and conclude that, although control may be a relevant factor in determining whether a particular work stoppage is primary or secondary, the Board improperly applied that standard here by giving it undue weight. But this conclusion would not invalidate the Board's determination that the work stoppage directed against Frouge was primary.[16] At most, it

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As to the other contractors, the Board held that, while Rule 17 was a valid work preservation clause, and hence outside the scope of Section 8(e), the Union engaged in a secondary boycott in violation of 8(b)(4)(B) when it refused to hang pre-cut doors which the contractors were obligated by their contracts with the project owners to use. The consequence of the Board's reasoning is that, where enforcement of a provision lawful as a general matter under Section 8(e) is coupled in a specific instance with an objective forbidden under 8(b)(4)(B), a work stoppage to enforce the provision may be unlawful (although the union would presumably remain free to enforce the provision by a suit for breach of contract). See our petition in No. 111, pp. 11-12, n. 15. We support that analysis here. Despite our difference with the AFL-CIO in this respect, however, it should be noted that the AFL-CIO does agree with us in regard to the correctness of the result below with respect to the Frouge incident, the only matter actually presented for review here (AFL-CIO Br. 3, n. 5).

[16] And, should it be concluded that the Board might have given undue emphasis to the factor of control, this would not cast doubt on or undermine the validity of the primary/secondary analysis with respect to agreements and activity under Sections 8(e) and 8(b)(4)(B), nor of the conclusion that the agreement involved in these cases is a primary one. By its terms Section 8(b)(4)(B) excludes primary activity, confirming the previous law on the question, and Section 8(e), for the reason discussed in our brief in No. 111, should similarly be read as not prohibiting primary agreements. And, again for the reasons set out in our brief in No. 111, work preservation clauses such as the one involved here are primary in nature, and thus not unlawful under Section 8(e);

would raise doubt as to the correctness of the Board's ruling that the work stoppages with respect to the other three contractors were unlawful. But that ruling is not before this Court. Thus, whatever may be the correctness of the Board's holding that the work stoppages directed against the other contractors were secondary because they had no control over the kind of doors to be installed, the Board correctly ruled that the work stoppage as to Frouge involved lawful, primary activity, since directly related to the effectuation of a work preservation clause, and was thus outside the scope of Section 8(b)(4)(B).

II

THE POLICY CONSIDERATIONS ADVANCED BY THE ASSOCIATION AND THE AMICI DO NOT MILITATE AGAINST THE BOARD'S INTERPRETATION OF SECTIONS 8(b)(4)(B) AND 8(e) OF THE ACT

Both the Company and several of the Amici contend that the Board's view—that Section 8(b)(4)(B) of the Act, and the companion Section 8(e), do not apply to a situation where a union disfavors a product because it deprives the employees immediately involved of work which they have traditionally performed—enables the union to block technological change and to perpetuate costly work practices, and is otherwise socially undesirable. See NWMA Br. 52–

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similarly, activity necessarily contemplated by such an agreement, *i.e.*, a refusal to handle pre-cut doors, is the direct result of the enforcement of such a valid agreement, and is not prohibited by Section 8(b)(4)(B).

56; Associated General Contractors Br. 19–32; but cf. AFL–CIO Br. 10–13. These economic and social arguments concerning the propriety of union efforts to preserve work for the employees whom it represents are more appropriately addressed to Congress than to this Court.

Thus, even if it be assumed that a prefabricated product is less costly for the builder and has other economic and social advantages,[17] the fact remains that, if the use of that product would deprive jobsite employees of work which they have previously performed, there is an injury to their legitimate interests. There are various means of accommodating these conflicting interests. Congress could, for example, decide that the private and public interest in promoting technological advance and cutting costs outweighed the interest of the individual employees in preserving work opportunities, and thus ban all union efforts to prevent the utilization of prefabricated products.[18] Or, Congress could decide that, in view of the difficulty of the problem and the strong considerations on both sides, it is best to leave the matter to the free

[17] The extent to which that is true in this case is not clear, for the record shows that the pre-cut doors were chosen by the project owners for structural and aesthetic reasons (Bd. Br. in No. 111, p. 4, n. 3). Moreover, the finishing of the doors was a relatively simple operation, which could readily be performed on the job site, and was in fact accomplished here by setting up a shop at the job site, with a production line by means of which all of the necessary work was done on the doors; the work on each door took only about eight minutes (R. 97–98).

[18] Cf. the Alger Bill, which Congress did not adopt in 1959 (Bd. Br. in No. 111, pp. 38–39, n. 36).

play of economic forces and the bargaining table. This alternative would enable the union and the employer to explore the problems of automation and technological change and to devise methods, which could be incorporated in a collective bargaining agreement, for cushioning the impact on the employees who would be affected thereby;[20] and, absent such contractual resolution of the problem, the union would be left free to exert economic pressure to protect against a loss of work opportunities. We submit that, in enacting Sections 8(b)(4)(B) and 8(e), Congress adopted the latter course.[21]

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[20] Experience has shown that employers and unions have been very imaginative in devising solutions to the problems of automation and technological change. See Killingworth, "Cooperative Approaches to Problems of Technological Change", in *Adjusting to Technological Change* (Harper & Row, 1963), 61–90; Kossoris, *Working Rules in West Coast Longshoring*, 84 Monthly Lab. Rev. 1 (1961).

The testimony of then Secretary of Labor Goldberg referred to (NWMA Br. 55; Associated General Contractors Br. 26–27) is consistent with the above analysis. In a portion of the statement which is not quoted, Secretary Goldberg went on to point out that technological advance creates serious problems for the persons who are displaced and that management, labor, and the government have the responsibility for devising programs and other procedures for alleviating the impact on those persons. See Hearings before the Subcommittee on Unemployment and the Impact of Automation, House Committee on Education and Labor, 87th Cong., 1st Sess. 852–855.

[21] As pointed out in our Brief in No. 111, Congress' purpose in enacting Section 8(e) in 1959 was the narrow one of plugging certain loopholes in the secondary boycott provisions of the Act. And its purpose in enacting Section 8(b)(4)(A) (now 8(b)(4)(B)) in 1947 was simply to outlaw secondary boycotts, but not all contractual restrictions on subcontracting nor any activity which is primary in nature. Bd. Br. in No. 111, pp. 14–15, 21, 29–30.

In short, with the problem of union opposition to prefabricated and other products, as with the problem of industrial featherbedding, however "desirable the elimination of all [such action] may have appeared to Congress, * * * when the legislation was put in final form Congress decided to limit the practice but little by law." *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 345 U.S. 100, 106.[21] That is, Congress decided to draw the line at secondary activity—it barred the union from putting pressure on an employer not to handle a product where its objective was to affect conditions elsewhere, but it did not prevent the union from pressuring that employer (or securing an agreement from him not to handle the product) where its objective was to protect the work opportunities of his employees.[22]

[21] With the 1959 amendments to the Act, as with the Taft-Hartley Act, "It is relevant to recall that the * * * Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests." *Local 1976, Carpenters' Union* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, 99–100.

[22] The Board's view that Section 8(b)(4)(B), and the companion Section 8(e), do not encompass union action directed against a product which is "primary" does not necessarily lead to all of the results detailed in the brief of the Associated General Contractors, at 21–22. The mere fact that the union *asserts* that its object is to preserve work for the employees immediately involved does not automatically privilege its conduct. The work claimed must be work that the employees either have performed or are capable of performing. Moreover, the claim must be a *bona fide* one, and not a subterfuge for a secondary objective.

It is thus quite inappropriate for the Association and the Amici to ask this Court to do what Congress chose not to do—prohibit all restrictions on subcontracting without regard to whether they are primary or secondary in nature. Rather, absent convincing evidence of congressional intent in this regard, the Court should refrain from reaching a result—such as that sought by the Association and the Amici in this case and in No. 111—which would effect a sweeping change in collective bargaining practices and labor-management relations generally. Ultimate resolution of the difficult underlying policy questions is better left to Congress, which of course is and will remain free to reconsider the matter at some later date.

Nor is analysis of the problem presented here aided by the assertion (Associated General Contractors Br. 60–63) that the Act does not require the employer to bargain with the union about his choice of products or equipment. Even accepting the view of the concurring Justices in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203 223, that "[d]ecisions concerning the commitment of investment capital and the basic scope of the enterprise * * * impinge only indirectly upon employment security," and thus a union ordinarily is not entitled to bargain over whether the employer purchases one product rather than another or the price he pays for it, it does not follow that the type of product used by the employer is always outside the area of mandatory bargaining. On the contrary, where, as here, the union is opposed to a product, not because of its price or its design, but because it deprives the employees whom the union represents of work which they have traditionally performed, there is a sufficiently direct connection between the product and employment security to bring the question respecting the use of that product within the area of mandatory bargaining under the Act. See our brief in No. 111, pp. 28–29, discussing *Fibreboard*.

CONCLUSION

For the reasons stated, the judgment below, insofar as it sustains the Board's finding that the work stoppage involving Frouge did not violate Section 8(b)(4)(B) of the Act, should be affirmed.

Respectfully submitted.

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